Lincoln Park Subacute and Rehab Center, Inc., One, and Lincoln Park Subacute and Rehab Center, Inc., Two *and* District 1199J, National Union of Hospital & Healthcare Employees, AFSCME, AFL–CIO. Cases 22–CA–22284, 22–CA–22528, 22–CA–22643, and 22–RC–11416

April 26, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On July 30, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, cross-exceptions, and a brief in support of cross-exceptions. The Respondent filed answering and reply briefs. The Charging Party filed a letter in opposition to Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision, and to adopt the recommended Order, as modified.

The Respondent has excepted to the judge's finding that it violated Section 8(a)(3) and (1) of the Act by issuing a warning to porter David Aldorando on August 13, 1997, and by relying in part on that warning when discharging Aldorando on January 11, 1998. The General Counsel has excepted to the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) when it discharged certified nurse's assistant Dorothy Baines on February 11, 1998. As explained below, we find that a remand to the judge for further findings and conclusions is necessary for resolution of these issues.

With respect to Aldorando, it is undisputed that Pacheco gave him a warning because he allegedly failed to advise his department head that he would not be able to work on the day of a Board representation election because he was going to serve as an observer for the Union. Aldorando testified that he did give notice to supervisor Tony Pacheco. Without resolving the credibility issue raised by Aldorando's testimony, the judge found that the warning to Aldorando was unlawful on its face. We disagree.

The warning was not discriminatory on its face merely because it referred to union activity as the undisputed reason why Aldorando was not present at work. An employer can lawfully maintain and enforce a neutral rule requiring advance notice of all employee absences, even those absences that are due to participation in protected concerted activity. The real question posed by Aldorando's warning is whether the Respondent discriminated in its specific application of an existing rule to him. The Respondent contends that it is company policy for an employee to advise his/her supervisor before a shift if they will not be working and that Aldorando failed to do so. The General Counsel, however, contends that Aldorando did, in fact, give such notice. In order to resolve this issue, the above-described conflict in the record must be addressed. Accordingly, we will remand this issue to the judge to make the appropriate credibility findings.

Since we are remanding the warning issue, we also find that a remand of the Aldorando discharge issue is necessary given the judge's finding that the discharge was unlawful because it was based in part on that warning. If the judge determines on remand that the Respondent lawfully warned Aldorando in August 1997, then there is no basis for finding the discharge unlawful.

Even if the judge reaffirms his finding that the warning violated Section 8(a)(3), however, further findings and conclusions are necessary with respect to the discharge. In September and November 1997, and again in January 1998, Aldorando received written disciplinary warnings for poor work performance. The judge found that the Respondent lawfully issued each of these warnings, and there are no exceptions to his dismissal of the complaint allegations based on these actions. The Respondent terminated Aldorando on January 11, 1998, after his last warning. The termination notice referred to "substandard work performance issues, *in addition to other disciplinary problems,*" (emphasis added) as the basis for the discharge.

In his decision, the judge stated that an inference can be drawn that "other disciplinary problems" referred to the August 1997 warning for absenteeism when serving as an election observer. He further stated that, "if that is the case," he would conclude that at least part of the Respondent's motivation for discharging Aldorando was the August 1997 warning, "notwithstanding the assertion by Pacheco that this warning played no part in the discharge decision."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In affirming the judge's conclusion that the Respondent's interrogation of David Aldorando was unlawful, we note that Aldorando's credited testimony shows that Supervisor Tony Pacheco interrogated him both about his own well-known union activity *and* about the union activities of other employees.

Ultimately, the judge construed "other disciplinary problems" as being the August 1997 warning. However, in doing so, he made no credibility finding as to Pacheco's contrary testimony mentioned above.

We believe it is necessary for the judge to make a credibility finding about Pacheco's testimony before resolving this issue. If Pacheco's testimony is credited, it would conflict with a finding that the subject language referred, at least in part, to the August 1997 warning. On the other hand, if Pacheco's testimony is discredited, there would be no such conflict. Accordingly, we find that a remand is necessary for the judge to make a credibility finding regarding this testimony by Pacheco.[3]

Finally, with respect to the discharge of Baines, we find that the judge's decision does not manifest full consideration of the record evidence and does not provide a sufficiently specific articulation of his *Wright Line*[4] analysis. This analysis should include an explanation of whether and how the General Counsel has satisfied the initial burden of persuading that antiunion sentiment, or animus, was a substantial or motivating factor, and if the General Counsel has met this burden, whether and how the Respondent has shown (or failed to show) that it would have discharged Baines even in the absence of her union activity. We must therefore also remand this issue for the judge to make the appropriate analysis.

In sustaining the Union's election objections and setting aside the election results, the judge relied on the unfair labor practice findings that are subject to our remand. We shall therefore also remand Case 22–RC–11416 to the judge for further consideration in light of his supplemental findings and conclusion on the related unfair labor practice issues.

None of the remaining issues are implicated by the issues remanded for further consideration and there is no reason to delay the resolution of those issues pending the outcome of the limited remand we are ordering. Accordingly, having considered the remaining exceptions and found them without merit, we have decided it is appropriate to issue a final Order with respect to those violations found by the judge that have not been remanded for further consideration.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Lincoln Park Subacute and Rehab Center Inc., One, and Lincoln Park Subacute and Rehab Center Inc., Two, Lincoln Park, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(a) and 2(a)–(c) and reletter subsequent paragraphs accordingly.

2. Delete the final paragraph of the Order, which begins "IT IS FURTHER ORDERED" and add the following:

"IT IS FURTHER ORDERED that the issues of whether the Respondent violated Section 8(a)(3) and (1) of the Act by warning and discharging employee Aldorando (Case 22–CA–22528) and by discharging employee Baines (Case 22–CA–22643), and whether there was objectionable conduct that warrants setting aside the results of the representation election held on August 8, 1997 (Case 22–RC–11416) are severed from the rest of the proceeding and remanded to the administrative law judge for appropriate action as noted above.

"IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable. "

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

[3] If the judge determines on remand that the warning was unlawful and that the discharge was in fact based in part on that unlawful warning, then the discharge would be unlawful as well, unless the Respondent has satisfied its *Wright Line* burden of showing that the discharge would have occurred even in the absence of the unlawful warning. See, e.g., *E-Z Recycling*, 331 NLRB 950, 952 (2000).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See also *Manno Electric*, 321 NLRB 280 fn. 12 (1995).

[5] We note that there are no exceptions to the judge's dismissal of several allegations of 8(a)(1) violations and of the allegation that the discharge of Christine Monroy violated Sec. 8(a)(3).

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their membership in or support of any labor organization, or about their knowledge of the union activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LINCOLN PARK SUBACUTE AND REHAB CENTER INC.

Marguerite R. Greenfield, Esq., for the General Counsel.
Richard M. Howard, Esq. and *Joseph Matza Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on March 22, 23, and May 5, 1999.

The petition in Case 22–RC–11416 was filed on June 13, 1997, and the first election was held on August 8, 1997. The unit consisted of about 600 employees and challenges were determinative. The employer filed objections to the election and on October 6 to 24, the Regional Office conducted a hearing. On November 6, 1997, the Region issued a report on challenges which resulted in the Union obtaining a majority of the valid votes counted. Nevertheless, on December 19, 1997, the hearing officer issued a report on objections and pursuant to an order issued by the Board on February 25, 1998, the election was set aside.

A notice of second election was issued by the Acting Regional Director on March 5, 1998, and a second election was conducted on April 19, 1998. The outcome of this second election was that a majority of the valid votes were cast against representation. Nevertheless, the Union, on April 24, 1998, filed timely objections to the second election and those allegations were consolidated with the allegations of the instant complaint, insofar as conduct which was alleged to have occurred during the period from August 8, 1997, the date of the first election, through April 19, 1998, the date of the second election.[1]

The charge and amended charges in Case 22–CA–22284 were filed on September 23, 1997, July 29, August 17 and 18, 1998. The charge and amended charges in Case 22–CA–22528 were filed on February 12, April 15, August 17 and 18, 1998. The charge and amended charges in Case 22–CA–22643 were filed on April 16, and August 18, 1998. A consolidated complaint was issued on August 20, 1998, and alleged as follows:

1. That in the summer of 1997, the Respondent by Sonia Velmonte and Myrna Calcagni, interrogated employees about their union activities. (No evidence was presented as to this allegation.)

2. That at various times from June 20, 1997, to January 20, 1998, the Respondent by Remy Aspril interrogated employees about their union activities.

3. That on or about July 22, 1997, the Respondent by Susan Fiesler asked employees to engage in surveillance of union activities.

4. That on or about July 22, and in August 1997, the Respondent, by Antonio Pacheco and Daisy Tavarez interrogated employees about their union activities.

5. That in or about an unknown date in April 1998, the Respondent by Elaine O'Keefe told employees that it would be futile to support the Union.

6. That the Respondent, for discriminatory reasons issued disciplinary warnings to Cristina Monroy on July 21 and 24, and September 9, 1997, and thereafter discharged her on September 10, 1997.

7. That on September 13, 1997, the Respondent for discriminatory reasons, issued a written warning to David Aldorando and thereafter discharged him on January 1, 1998.

8. That on or about February 17, 1998, the Respondent for discriminatory reasons, discharged Dorothy Baines.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates a nursing home which employs over 600 people in various categories. As noted above, the last election was the third held within a 5-year period and both management and employees had considerable experience with this type of event.

A. Discharge of Christine Monroy

There are four social workers employed at the facility who report to Sue Fiesler, the assistant administrator. Monroy began her employment in January 1997 and was discharged on September 10, 1997.

When the Union first filed its petition in June 1997, there was a question as to whether the social workers would be included in the voting unit. But eventually they were and they voted.

Monroy's first evaluation was dated June 30, 1997, and was given to her on July 4. This was a favorable review albeit, it was noted that she was coming in late. At that time, Monroy

[1] Previously in 1993, another Union had filed a petition for an election. Thus, by 1998, both the employees and management of the Respondent had obtained a lot of experience with elections and election campaigns.

states that she was vaguely aware of union talk at the facility, but was not involved.

According to Monroy, in about June 1997, she questioned the employer about whether she was a salaried or hourly paid employee. She states that in July 1997, she had a problem with her check in that she had been docked for coming in late and that she contacted the State wage-hour department to ascertain if she should be classified as hourly or salaried. According to Monroy, she was persistent and had further conversations about this issue with Fiesler on July 23, 25, 29, and in August 1997. As far as I can tell, Monroy's position was that if she was a salaried employee she shouldn't be docked for lateness; but that if she was an hourly paid employee, she should be paid overtime for any time she spent after her normal schedule. This is of course, not an unreasonable position, but was an issue that affected her personally, was not raised by her in concert with the other social workers, and was the issue that she made her cause.

Monroy testified that at one point before the election scheduled for August 8, 1997, Fiesler met with the social workers and asked if they had heard anything on the floors from the other workers. They said that they hadn't. According to Monroy, she was uncomfortable because she felt like she was being asked "to sort of spy and report back to Fiesler what was being said on the floors." This casual comment, which was denied by Fiesler and another social worker, Alyse Jasinski, does not, in my opinion, amount to an illegal inducement to engage in surveillance and cannot, even if credited, support this allegation of the complaint.

According to Monroy, the employer's owner, CarlaTurco, held a meeting with employees in late July or early August 1997 at which she stated, in substance, that the Teamsters had tried to come in to one of her other facilities and that compared to the Teamsters, Local 1199, were nothing but peons and that she was not going to have 1199 break her. Monroy testified that immediately after the meeting, she spoke to Colleen Wheeler, the personnel director, and told her that she was offended by Turco's remarks which she felt were condescending and threatening to the employees, many of whom were humble immigrants who had families and were trying to earn a living. Wheeler testified that she did not recall any such conversation with Monroy and did not discuss the Union with her.

Monroy testified that at another preelection meeting, held by O'Keefe, the social workers left the meeting asserting that they had other things to do. She also testified that at a third preelection meeting O'Keefe told the employees that the company had plenty of job applications if the Union was voted in and decided to strike. She states that the employees were invited to look at the applications in a box placed in the room. According to Monroy, she told Wheeler that she thought that O'Keefe's remarks were a violation of confidentiality regarding employee applications.

The point of Monroy's testimony regarding the three meetings, is I believe, to show that although Monroy was not active in support of the Union, the Respondent's management may have thought that she was and made decisions affecting Monroy's employment accordingly.

On July 21, 1997, Fiesler gave a verbal counseling to Monroy which was documented as follows:

> As per our conversation July 18, 1997, documentation must be in the medical record unless due to a confidential nature is placed in a file in the Social Services office. All documentation must be current.
>
> If any post charting is done, the date the documentation is written must be used.
>
> The facility adheres to strict regulations and anticipates that the employees will as well.

The above counseling involved a patient suffering from dementia who had claimed that she was slapped by another employee and whose claim was being investigated by the employer's ombudsman. In this connection, Monroy was asked for any documentation that she had regarding conversations about the patient's dementia with the granddaughter. The evidence shows that although Monroy claimed that she had documentation of a conversation on July 16, 1997, she did not, and went down to her office to create it.

On July 24, 1997, Monroy and the other three social workers all received warnings for eating lunch together after having previously been told that at least one should be on duty at all times. Monroy concedes that she and the others ignored the earlier order. The warning read:

> The first infraction is that all 4 social service employees were off duty at the same time. The 2nd and more serious infraction involves the direct contravention of an order of the Assistant Administrator.

On or about September 8, 1997, Judy Kaiser, a patient's relative, came for a visit and discovered that the patient was no longer in her room. Fearing that her relative was dead, Kaiser made inquiries and found out that the patient had been moved to another room without the legally required permission having been sought and obtained from her as the responsible party. She complained to Remy Aspril, director of nursing who in turn, notified Fiesler. When Fiesler asked Monroy, whose responsibility it was to obtain permission for the move, Monroy claimed that she had tried unsuccessfully to contact the responsible party for a couple of days. Fiesler credibly testified that she then contacted Kaiser who said that she had an answering machine at home and work and that no one tried to contact her.

While all of that was going on, Monroy was given another warning on September 9, 1997, which stated inter alia; "Tardiness and failure to ask permission for overtime will no longer be tolerated. Failure to show immediate improvement shall result in further disciplinary action up to and including termination."

On September 10, 1997, Monroy was told by Fiesler that she was discharged.

There are three possible theories regarding the motivation for Monroy's discharge. Of these, the assertion that she was discharged for union activity is the least probable.

The fact is that Monroy did not involve herself in any union activity of any kind. To the extent that she had issues about which she complained to management, these were related to her personally and dealt with whether or not she was covered by the overtime provisions of the Fair Labor Standards Act. While such complaints may well have been legitimate, they did not

constitute union activity or concerted activity protected by Section 7 of the Act.

The employer presented evidence to show that prior to her discharge, Monroy (along with the other social workers), received a deserved warning regarding their lunch practices. The employer also presented convincing evidence that Monroy did not carry out her recordkeeping functions in a timely or accurate fashion. Finally, the employer presented convincing evidence that Monroy had failed to notify and obtain approval from a family member before a patient was moved from one room to another. Given the series of incidents involving Monroy during the relatively short period of time that she was employed, it is my opinion that the employer has demonstrated that its reason for discharging her were devoid of any anti-union motivation. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

B. David Aldorando

Aldorando was employed as a porter whose job consisted of cleaning up resident's rooms. His supervisor was Tony Pacheco. He was active for the Union from the start of the Union's campaign and indeed had been an active and open supporter for a different union in a previous election campaign in 1994.

The employer concedes that its managers were aware that Aldorando was an active union supporter. And Aldorando testified that at a meeting before the first election, he directly challenged statements made by O'Keefe about the Union, stating that they were lies and that he was organizing for the Union. His position in favor of the Union was clearly well known among employees and supervisors alike.

Aldorando testified that on about three occasions before the first election (held August 8, 1997), his supervisor Antonio Pacheco asked him about the Union and if he was organizing for the Union. Aldorando asserts that he told Pacheco that he didn't know who was involved. This was denied by Pacheco and the Respondent argues that it was not necessary for Pacheco to question Aldorando about the Union, because Aldorando's feelings were openly expressed and well known. In this instance I shall credit Aldorando and conclude that Pacheco interrogated Aldorando about the union activities of other employees.

There was also one other employee, Michael Pierre, who testified that before the first election, Remy Aspril asked him what he thought of the Union to which he responded that he thought that a union would be good. Here too, I shall credit Pierre, who was a disinterested witness on a very limited point.

Prior to the first election, Aldorando was designated by the Union to be one of its observers and notice to this effect was sent to the employer at least 2 days before the election. He did in fact act as an observer and on August 13, 1997, Aldorando received a warning because he allegedly failed to advise his department head that he would not be able to work on the election day because he was designated to be one of the Union's observers. In my opinion, this warning, on its face, was a violation of Section 8(a)(1) of the Act.

On September 19, 1997, Aldorando received a warning from Antonio Pacheco for failing to completely clean his assigned rooms. This stated:

> Failure to follow instructions. Today 9/19/97, an inspection was made on your wing. The inspection clearly shows that you have not been carrying out your responsibilities as you should be. Underneath the majority of all the beds need dust mopping and mopping. Closet tracks and floors have not been swept or mopped. Window curtains found to be missing hooks causing the curtains to hang inappropriately. Please be advised that failure on your behalf to correct these discrepancies, will lead to further disciplinary action to include possible suspension and/or termination of employment.

On November 28, 1997, Pacheco issued a second warning to Aldorando. This warning stated:

> On 11/26/97 an inspection was done on your wing . . . and all your closet floors with the exception of room 203 and 201 were found dirty. Please be advised that the quality of your work must improve. You have become inconsistent with your work performance. Please be advised that a failure on your behalf to correct this discrepancy will result in further disciplinary action.

On or about January 9, 1998, Antonio Pacheco issued a third warning to Aldorando which stated:

> Today 1/9/98 an inspection was made on your wing and the following discrepancies were noted. 8 rooms had the cubicles [curtains] off the hooks. We found 7 rooms where the floors had not been properly swept and mopped. And we also found 5 closets to be dusty. This is the 3rd time we have had problems with your wing. This type of work performance on your behalf can no longer be tolerated. Be advised that effective 1/12/97 you are hereby suspended pending an investigation.

Thereafter, the Respondent by a notice of termination dated January 11, 1998, advised Aldorando that he was being discharged. This states:

> After a thorough investigation regarding substandard work performance issues, *in addition to other disciplinary problems*, it is the decision of the facility to terminate your employment with Lincoln Park.effective January 16, 1998. [Emphasis added by me.]

Except as to the inspection of January 9, 1998, Aldorando does not dispute the facts set forth in the warnings. His explanation is that patients in the rooms assigned to him have objected to him cleaning under their beds or in their closets and therefore, pursuant to the employer's policy, he left those areas alone. As far as the curtains, Aldorando asserts that this was not his job.

Regarding the January 9 warning, Aldorando states that he told Pacheco that he did in fact clean the rooms and that it was the nurses who sometimes pulled the curtains off the tracks.

The credible evidence is that for a period of time, Aldorando did not fully clean the rooms assigned to him which had been discovered by Pacheco on inspections. Aldorando's excuse is that the patients refused to allow him to do his job and in this

respect, Pacheco acknowledged that from time to time, residents do object and that the porter in such a case is not supposed to clean the area; instead reporting the incident to him and having social services try to handle the situation.

It would be one thing, if there had been one or two residents who objected to Aldorando's cleaning. But it seems from this record that Aldorando, at times, was not cleaning most of the rooms assigned to him. His testimony was that most of the residents on his wing made objections to him cleaning in their closets or under their beds and that he complied with their desires. He also testified that he told Pacheco of this but Pacheco testified that this was not so. I must say that it seems odd to me and highly improbable that the majority of the residents in a given area would object to having their rooms fully cleaned or that the employer would allow that situation to continue for an extended period of time. (Especially in a nursing home where infections can spread.)

While I find that Aldorando truthfully asserted that there are times when porters will abstain from cleaning portions of a room when a patient objects, it stretches credulity to believe that *most* of the patients in the rooms to which he was assigned, refused to allow him to clean the spaces that needed to be cleaned. Cleaning the rooms was Aldorando's job. And he admits that as to most of the rooms assigned to him, there were occasions when he did not do his job. Accordingly, I find that the September and November 1997 and the January 9, 1998 warnings were properly issued and did not violate the Act.

If Aldorando had not received the warning in August 1997 in relation to his acting as a union election observer, I would have little hesitation in dismissing the 8(a)(3) allegations regarding his discharge notwithstanding the employer's knowledge that Aldorando was a union activist.

The August 1997 warning does, however, give me pause as it indicates, on its face, that Pacheco and the Respondent were willing to retaliate against Aldorando because of his union activity. Also, the termination notice states that he was being fired because of his substandard work performance *in addition to other disciplinary problems.* An inference therefore can be drawn that Aldorando's other disciplinary problems refer to the warning that was issued to him back in August 1997 and which was never withdrawn. And if that is the case, and notwithstanding the assertion by Pacheco that this warning played no part in the discharge decision, then I would conclude that at least part of the Respondent's motivation for Aldorando's discharge was the fact that he had received this earlier warning which was based on his union activity.

Under *Wright Line*, 251 NLRB l083 (l980), enfd. 622 F.2d. 899 (1st Cir. l98l), cert. denied 455 U.S. 989 (1982), once the General Counsel has established a prima facie showing of unlawful motivation, the burden is shifted to the Respondent to establish that it would have laid off or discharged the employee for good cause despite his other union or protected activities. In the present case, the termination notice indicates, on its face, that Aldorando's work performance problems were not the only reason that he was discharged. In fact, a fair reading of this notice indicates to me that but for the "additional disciplinary problems" which I construe as being the August 13 warning, Aldorando would not have been fired. Therefore, I conclude that as the General Counsel has made out a primae facie case and that the Respondent has failed to establish that it would have discharged Aldorando for good cause despite his union activity, I shall conclude that his discharge violated Section 8(a)(1) & (3) of the Act.

C. The Discharge of Dorothy Baines

Dorothy Baines was employed as a certified nurse's assistant since 1988. She testified, and employee Ghisline Demesier corroborated, that she was a union supporter whose activities including passing out union cards and soliciting union support. According to Baines, at company preelection meetings held by Peter Bremer, he asked what a union could do that the Company could not do. Baines states that she responded that the Union gave health and dental benefits.

Prior to the events in this case, Baines had been advised on more than one occasion that patient's relatives had complained about her. However no adverse actions were ever taken against her by the company because its internal investigations did not prove the allegations. (In the context of a nursing home, which operate under governmental regulations and where some of the older residents may be suffering from dementia, accusations by patients against staff present really difficult problems of balancing patient and employee rights. Such complaints have to be investigated and taken both seriously and skeptically.) Notwithstanding such complaints, Baines' last job appraisal, dated March 31, 1997, was very favorable in all respects.

On February 11, 1998, one of the patients assigned to Baines (May Kuebler), suffered from bed sores and therefore was not in diapers. Her shift was from 3 to 11 p.m. and Baines was responsible for the care and feeding of six residents. Near the start of her shift, she attended a half hour training session. At around 6 p.m., when the residents are normally fed, a male resident, to whom she was not assigned, insistently asked her to put him to bed. Rather than ignoring him, Baines assisted this patient before returning to her regular patients.

When Baines returned to her regular patients, she discovered that Kuebler's bed was soiled and that some of the fecal matter had dried. (Indicating that this situation had lasted for some time.) The patient's relative who was present, complained and Baines pulled the curtain surrounding the bed while telling the relative that she couldn't be in two places at the same time. Baines heard the relative say that she was not going to let this pass.

The patient's relative made a complaint to the employer, asserting that Baines had neglected the patient and had been rude as well. After investigating the matter, Aspril decided to discharge Baines and this occurred on February 18, 1998. Aspril asserted that this incident was the only reason that Baines was discharged and that the decision was based on her conclusion that Baines had neglected the patient and had been rude to the patient's family.

There is no question but that Baines, instead of attending to her own assigned patients on February 11, assisted another person who was assigned to another aide. Whatever her motivation, (probably altruistic), the fact is that Ms. Kuebler was left alone for quite a while in a bed which she had soiled and which should have been cleaned up earlier. While Baines'

actions at the bedside do not strike me as being particularly rude, I could imagine that a patient's relative, in these circumstances, might construe her abruptness as constituting rudeness. In any event, there is no dispute that the patient's relative did in fact make a complaint about Baines which was acted on by management.

It is difficult for me to say, given my experience and the record in this case, whether the employer's decision to discharge Baines for the events of February 11, 1998, were disproportionate to her conduct. My gut reaction is that it was, given her 10 years of service and her prior evaluation. On the other hand, the discharge occurred well after the first election and before the Board ordered a second election. Thus, the discharge did not occur at a time of union activity or electioneering.

Inasmuch as the employer has presented evidence of conduct which supports its decision to discharge Baines for reasons other than her union or protected activity, it is my opinion, that on balance, the employer has met its *Wright Line* burden. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

D. Miscellaneous

Prior to the second election, Elaine O'Keefe held meetings with groups of employees. The only two employees to testify about these meetings were Millicent Hopper and Ghisline Demesier. Both described a meeting with balloons and it seems that they are either describing the same meeting or two separate meetings with different groups of employees held on the same day.

Demesier testified that at the meeting she attended with about 25 to 30 employees, O'Keefe held up a balloon labeled Local 1199 and said that this represented the Union; that you "don't need or want it" and that she then popped the balloon. However, her description of what else O'Keefe said is completely disjointed and incomprehensible.

Millicent Hopper testified that about 2 weeks before the second election, O'Keefe addressed employees at a meeting. Her memory of what was said was not particularly good and Hopper testified that O'Keefe said, "that with a union or without a union, if we, whatever the owner want to give us, will give us."

Hopper also testified that about 2 weeks before the second election, Daisy Tavares asked her how she was going to vote and said that she hoped that Hopper wouldn't vote for the Union. She also testified that about a week before the election, Pacheco asked her how she was going to vote and said that he hoped that Hopper was for the company. Tavares and Pacheco credibly denied the interrogations.

In my opinion neither the testimony of Hopper or Demesier was sufficiently specific or reliable to warrant a finding that O'Keefe, at a preelection meeting, told employees that selecting a union would be futile. Nor will I conclude that the employer, before the second election, coercively and unlawfully interrogated Hopper about how she intended to vote in the upcoming election.

Objections to the Election

The Union filed objections to the second election on April 24, 1998, but withdrew its Objections 1, 3, 4, and 5. It also withdrew part of its objection 2, except to the extent that it alleged that the employer illegally discharged Christina Monroy, Dorothy Baines, and David Aldorando. In the second report on objections, the Regional Director ordered a hearing on the Union's second objection, to the extent not withdrawn. He also ordered a hearing on allegations that the employer unlawfully disciplined these three employees; that it interrogated employees about their union activities; that it told employees that it would be futile to support the Union; and that it requested that employees engage in surveillance of union activities. These allegations, which are coextensive with the allegations of the complaint, were consolidated for hearing.

I have reached conclusions on all of these allegations which need not be repeated. Although I have concluded that most of the allegations lack merit, I have concluded that the employer violated the Act by issuing a warning to Aldorando regarding his participation in the election as an observer and that it further violated Section 8(a)(1) and (3) of the Act by unlawfully discharging him on January 11, 1998. Both of these actions occurred between the time of the first and second elections.

In *Novotel New York*, 321 NLRB 624, 639 fn. 68 (1996), the Board set out the rules regarding the critical period after a first election has been set aside.

> As a general rule, the period during which the Board will consider conduct as objectionable (the critical period), is the period between the filing of the petition and the date of the election. *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961). If the election is set aside, the critical period for the second election begins running from the date of the first election. *Singer Co*., 161 NLRB 956 fn. 2 (1966).

Apart from the two actions taken against David Aldorando, the Respondent, in the main, seems to have comported itself with the intent to have a second election that would not be subject to being overturned. This is not always so easy given the number of employees and supervisors involved and the length of time that passed between the holding of the first and second election.

The Respondent cites cases for the proposition that in certain circumstances, unfair labor practice violations may nevertheless be insufficient to overturn an election where it is impossible to conclude that conduct affecting one or a few employees in a relatively large voting unit would have affected the results of the election. *Caron International*, 246 NLRB 1120 (1979); *Super Thrift Markets*, 233 NLRB 409 (1977); and *Coca Cola Bottling Co*., 232 NLRB 717 (1977).[2]

It is my opinion, however, that a disciplinary warning given to an employee because of his participation in the first election as an observer and his subsequent discharge, in part, because of his union activity, is not de minimus, not inconsequential and likely to have an affect on the other employees who are eligible to vote. For this reason I shall recommend that the objections

[2] In *Caron International,* supra, the Board stated that; "In resolving the question of whether certain Employer misconduct is *de minimis* with respect to affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors."

be sustained and that the second election be set aside and a new election held.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, the Respondent has violated Section 8(a)(1) of the Act.

2. By warning and discharging David Aldorando because of his activities on behalf of District 1199J, National Union of Hospital and Healthcare Employees, AFSME, AFL–CIO, the Respondent has violated Section 8(a)(1) & (3) of the Act.

3. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act in any other manner alleged in the complaint.

5. The Union's objections are sustained.

6. The conduct found to be objectionable are sufficiently serious to set aside the election and to hold a new one.[3]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined and discharged David Aldorando, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his discharge to date of his reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Lincoln Park Subacute and Rehab Center Inc., Lincoln Park, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or discharging employees because of their membership in or activities on behalf of District 1199J, National Union of Hospital and Healthcare Employees, AFSME, AFL–CIO.

(b) Interrogating employees about their union activities or the union activities or sympathies of other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Aldorando, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning dated August 13, 1997, and to the suspension and discharge of David Aldorando and within 3 days thereafter notify him in writing that this has been done and that the suspension and/or discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Lincoln Park, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 13, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 22–RC–11416 be remanded to the Regional Director and that the election held on April 19, 1998, be set aside and that a new election be scheduled.

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[3] See *Playskool Mfg. Co.*, 140 NLRB 1417, 1419; *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786–1787 (1962).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."